

1978-1979 Ky. Op. Atty. Gen. 2-569, Ky. OAG 79-626, 1979 WL 33473 (Ky.A.G.)

*1 Office of the Attorney General
Commonwealth of Kentucky

OAG 79-626

December 6, 1979

Mrs. Suzanne Darland
Assistant Editor
Scripps-Howard Press Co.
P. O. Box 7432
Louisville, Kentucky 40207

Dear Mrs. Darland:

This is in answer to your letter of December 3 in which you present the following facts and questions:

“In St. Matthews, Winifred Hepler, who is a clerk for Jefferson State Vocational School, has run for and won a seat on the city council. The city is a fourth class city. At the time of the filing and election, no compensation was offered for the position. But last week, the council voted themselves a salary of \$3,000 a year.

“I understand a state employee can neither run for nor accept the seat of an office for which there is compensation. But at the time Ms. Hepler ran, there was no compensation offered.

“Will she lose her council seat as long as she remains a state employee? Can she refuse the salary? Can she accept it?”

In response to the above, we initially refer to [KRS 18.310\(4\)](#) from which we quote the following:

“ . . . Officers and employees of the classified service may be candidates for and occupy a town or school district office if the office is one for which no compensation, other than a per diem payment, is provided and the election is on a nonpartisan basis.” (Emphasis added.)

You will note that the above quoted excerpt of the statute prohibits, in effect, any classified employee from not only being a candidate for a municipal office but from occupying such office if it is one for which compensation is provided, other than a per diem payment.

Since the office of council will now carry a salary of \$3,000 per year such would, in our opinion, cause the councilwoman in question to violate the terms of [KRS 18.310\(4\)](#) quoted above if she assumes the office. The fact that the compensation had not been set prior to her candidacy and election to the office would not relieve her of the violation, since the statute is clear in that the office simply cannot carry any compensation. We might also add that pursuant to [KRS 86.053](#) the legislative body is required to fix compensation for members of the council in an amount not exceeding \$3,000 per annum, which the council has belatedly done.

The fact that no compensation had ever been previously fixed for members of the city council would not prohibit it from fixing the compensation when it did or after the first Monday in May in the year in which they are elected [[required by [KRS 64.580](#)] in view of [KRS 64.730](#) and OAG 74-142.

Though the individual in question will, in our opinion, violate the state merit system statute if and when she assumes office, such violation would have no effect on her serving as city councilman since the penalty provision under [KRS 18.990](#) simply requires upon conviction the forfeiture of the merit position and makes the individual ineligible for any office or position with the Commonwealth for one year. The penalty provision also carries a misdemeanor sentence.

*2 In response to your last question concerning her possible refusal of the salary, the answer would be in the negative. Every public officer must accept the compensation attached to his position, for not to do so would be against public policy as held, for example, in the case of [City of Louisville v. Thomas, 257 Ky. 540, 78 S.W. 2d 767 \(1935\)](#), from which we quote the following:

“In the case of [Town of Nortonville v. Woodward, 191 Ky. 730, 231 S.W. 224, 225](#), in which a reduction in the salary of the office of marshal of a town of the sixth class was involved, it is said: 'It is a general rule that an agreement by an officer to accept less than the fixed salary of an office to which he is elected or appointed for his compensation is void, as against public policy.'”

“In the case of [City of Winchester v. Azbill, supra](#), this is quoted with approval, and in addition thereto it is said:

“ 'The rule is equally well settled that an officer cannot estop himself from claiming full payment of his salary as fixed by statute, and where part of his salary has been withheld under an illegal agreement, recovery is allowed. Cases, *supra*.

“ 'An agreement by a public officer to accept less than the fees or salary prescribed by law being contrary to public policy, the courts should not give effect to it by spelling out a waiver or estoppel' ”

Of course, what she does with the compensation after it is accepted is of no consequence and would not relieve her of the violation.

We trust the above sufficiently answers your questions.

Yours very truly,
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Attorney General

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